



DEPARTMENT OF THE NAVY

BOARD FOR CORRECTION OF NAVAL RECORDS

2 NAVY ANNEX

WASHINGTON, D.C. 20370-5100

TRG

Docket No: 5151-99

25 October 2000

From: Chairman, Board for Correction of Naval Records  
To: Secretary of the Navy

Subj: REVIEW OF NAVAL RECORD OF [REDACTED],  
[REDACTED]

Ref: (a) Title 10 U.S.C. 1552

Encl: (1) Case Summary  
(2) Subject's naval record

1. Pursuant to the provisions of reference (a), Petitioner, a former enlisted member of the United States Navy filed an application with this Board requesting, in effect, that his record be corrected to show that he was discharged by reason of a physical disability vice by reason of misconduct.

2. The Board, consisting of Mr. Morgan, Mr. Whitener and Mr. Harrison, reviewed Petitioner's allegations of error and injustice on 11 October 2000 and, pursuant to its regulations, determined that the corrective action indicated below should be taken on the available evidence of record. Documentary material considered by the Board consisted of the enclosures, naval records, and applicable statutes, regulations and policies.

3. The Board, having reviewed all the facts of record pertaining to Petitioner's allegations of error and injustice, finds as follows:

a. Before applying to this Board, Petitioner exhausted all administrative remedies available under existing law and regulations within the Department of the Navy.

b. Although it appears that Petitioner's application was not filed in a timely manner, it is in the interest of justice to waive the statute of limitations and review the application on its merits.

c. Petitioner enlisted in the Navy for four years on 23 August 1993 at age 21. On 22 May 1995 a medical board diagnosed him with scoliosis, which existed prior to entry into the Navy, and mechanical low back pain, which did not exist prior to entry into the Navy. On 2 and 23 June 1995 he received nonjudicial punishment for five short periods of unauthorized absence and wrongful use of a decal on his car.

d. On 12 July 1995 the physical evaluation board (PEB) found that Petitioner's low back pain was rated as 10% disabling and recommended his discharge with severance pay. This

recommendation was accepted by Petitioner. On 31 July 1995 the President of the PEB, acting for the Secretary of the Navy, issued a "Notification of Decision", which directed the Chief of Naval Personnel to discharge Petitioner with severance pay.

e. Petitioner received his third NJP on 4 August 1995 for an unauthorized absence of about one hour and two instances of disobedience. On 11 August 1995 he was notified of separation processing due to his commission of a serious offense. Three days later, he was convicted by civil authorities of driving on a suspended license and having no proof of insurance. He was sentenced to 48 hours in jail and was fined \$235. An administrative discharge board met on 18 December 1995 and found that Petitioner had committed misconduct due to his commission of a serious offense and recommended a general discharge. After review by the discharge authority, this recommendation was approved. The general discharge by reason of misconduct was issued on 20 February 1996.

f. Attached to enclosure (1) is an advisory opinion from the Navy Personnel Command which states, in part, as follows:

... The review reflects that the petitioner was properly discharged for misconduct under the policies provided in Part E section 2072 of (SECNAVINST 1850.4C) and paragraph 5 of (MILPERSMAN 3640474). These regulations cite no provision giving preference to the first initiated action. Misconduct committed anytime prior to actual separation for disability may result in an unfavorable discharge. That notwithstanding, petitioner's acts of misconduct commenced prior to 31 July 95. Therefore, favorable action on this petition is not recommended.

g. Article 3640474.5 of the Military Personnel Manual (MILPERSMAN) states, in part, as follows:

Members who have received an administrative discharge for misconduct .... shall not be afforded Medical Board action or retained on active duty for further medical treatment, regardless of separation physical determination that the member is unfit for discharge.

Section 2072a of SECNAVINST 1850.4C (Disability Evaluation Manual) states as follows:

Disciplinary separation is not precluded by the disability statutes and such separations as described herein supersede disability separation or retirement. Whenever a member is being processed for disability

evaluation and, at the same time, administrative involuntary separation for misconduct, disciplinary proceeding which could result in a punitive discharge, or an unsuspended punitive discharge is pending, disability evaluation shall be suspended and the non-disability action monitored by (the Chief of Naval Personnel {CNP}), as appropriate. If the action taken does not include punitive or administrative discharge for misconduct, the case will be forwarded or returned to the PED for processing. If the action includes either a punitive or administrative discharge for misconduct, the medical board report shall be filed in the member's terminated health record.

h. Section 1013 of the Disability Evaluation Manual also states that in a case such as Petitioner's where an evaluation is made solely on the evidence of record, a final decision on disability processing is made when the member accepts the findings of the PEB. Section 1028 states that the Notification of Decision informs CNP of the final decision and disposition of an individual's case. Section 2180 delegates SECNAV's authority in these routine cases to the President of the PEB. Section 5004 states that under the circumstances of this case, a Notification of Decision may be canceled by the President of the PEB, only if directed to do so by SECNAV or the Director of the Naval Council of Personnel Boards.

#### CONCLUSION:

Upon review and consideration of all the evidence of record the Board concludes that Petitioner's request warrants favorable action. The Board notes the provisions of Section 2072 of the Disability Evaluation Manual to the effect that disability evaluation proceedings are suspended during administrative separation processing, and the former proceeding is normally canceled if the latter results in separation. However, the Board believes that the disability proceedings essentially become final when an individual such as Petitioner accepts the findings of the PEB and the President of the PEB, acting for SECNAV, approves the PEB findings and directs discharge by issuing the Notification of Decision. At that point, the disability evaluation process ends, and the disability separation process begins. A disability discharge may then be stopped only by someone authorized to cancel the Notification of Decision, such as the Director of the, Naval Council of Personnel Boards or SECNAV, and not CNP. Since Petitioner's Notification of Decision was never canceled, the Board concludes that the decision to discharge him by reason of physical disability was final. This is especially true since the administrative separation processing was not begun until after the Notification of Decision was issued.

Therefore, the record should be corrected to show that Petitioner was issued a general discharge by reason of physical disability with severance pay, vice the discharge by reason of misconduct now of record.

RECOMMENDATION:

a. That Petitioner's naval record be corrected to show that on 20 February 1996 he was issued a general discharge by reason of a physical disability with severance pay pursuant to Title 10 U.S.C. 1203 based on the 31 July 1995 diagnosis of mechanical low back pain (DVA code 5295) with a disability rating of 10%, vice the general discharge by reason of misconduct actually issued on that date.

b. That any material or entries inconsistent with or relating to the Board's recommendation be corrected, removed or completely expunged from Petitioner's record and that no such entries or material be added to the record in the future.

c. That any material directed to be removed from Petitioner's naval record be returned to the Board, together with this Report of Proceedings, for retention in a confidential file maintained for such purpose, with no cross reference being made a part of Petitioner's naval record.

4. It is certified that a quorum was present at the Board's review and deliberations, and that the foregoing is a true and complete record of the Board's proceedings in the above entitled matter.

ROBERT D. ZSALMAN  
Recorder



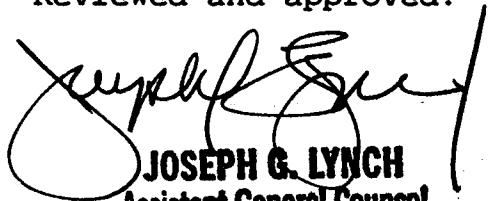
ALAN E. GOLDSMITH  
Acting Recorder

5. The foregoing report of the Board is submitted for your review and action.



W. DEAN PFEIFFER

Reviewed and approved:



JOSEPH G. LYNCH  
Assistant General Counsel  
(Manpower And Reserve Affairs)

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